

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

JAMES THOR KIRK,

Petitioner,

v.

CIV 15-0614 MV/KBM

GREGG MARCANTEL,  
Secretary of Corrections,

Respondent.

**ORDER OVERRULING KIRK'S OBJECTIONS TO THE MAGISTRATE  
JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on Petitioner James Thor Kirk's ("Kirk's") "Motion of Objections to (Doc 22)," (*Doc. 23*), filed April 28, 2016. Kirk objects to the Chief Magistrate Judge's Proposed Findings and Recommended Disposition ("PF&RD") (*Doc. 22*), filed April 18, 2016, which recommended that Kirk's Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody be dismissed with prejudice. Having considered Kirk's objections and the applicable law, the Court finds that Kirk's objections are not well-taken will be overruled.

When a party files timely written objections to the magistrate judge's recommendation, the district court will conduct a *de novo* review and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(C). *De novo* review requires the district judge to consider relevant evidence of record and not merely to review the magistrate judge's recommendation. *In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995). "[A] party's objections to the magistrate judge's [PF&RD] must be both timely and specific to

preserve an issue for *de novo* review by the district court or for appellate review.”

*United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996). Following a *de novo* review of the evidence in the record, the Court finds that Kirk’s objections are without merit.

Kirk’s first numbered objection Kirk states that certain New Mexico State Police officers “reported inconsistent findings of drugs.” *Doc.* 23 at 1. Kirk then lists certain records he deems to be inconsistent. *Id.* at 1-2. These assertions appear to relate to Kirk’s “Modified – Complaint for Damages” which the Magistrate Judge found to be improperly filed in this action. *See Doc. 20*. The Court agrees with the Magistrate Judge that Kirk’s “Modified – Complaint for Damages” was improperly filed in this case and overrules Kirk’s objection.

Kirk’s second numbered objection is directed at his claim that his pretrial confinement at the Valencia County Detention Center was constitutionally excessive. *Doc. 23* at 2. The Magistrate Judge found that Kirk waived this claim when he entered a plea of no contest to the charges against him. *Doc. 22* at 8. Kirk’s objection to this finding asserts that he told the public defenders assigned to him to file motions for the violation of his right to a speedy trial and to suppress evidence, that he was sentenced without the aid of counsel, and that he was incompetent to enter into the plea agreement that led to his sentence. *Id.* at 2-3. These objections do not address the merits of the Magistrate Judge’s finding and are unsupported by the record. Accordingly, the Court will overrule Kirk’s second objection.

Kirk's third numbered objection appears to be directed at the Magistrate Judge's finding that he did not meet the conditions precedent for an award of good time credit as stated by Warden Chavez in his December 14, 2015 letter to Kirk, and also asserts that he was not in possession of controlled substances when he was arrested and so "therefore the habitual enhancement should not have been filed." *Doc. 23* at 3. The Court agrees with the Magistrate Judge's finding that Kirk has failed to meet either of the conditions precedent for the award of good time credit stated in Warden Chavez' letter. Moreover, Kirk's assertion regarding the "habitual enhancement" is belied by his plea agreement in which he agrees that he "should be sentenced as a 2nd Habitual Offender pursuant to the HABITUAL OFFENDER STATUTE." *Doc. 14-1* at 9.

**IT IS THEREFORE ORDERED** that Kirk's Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 23*) are **overruled**, and the Court hereby adopts Judge Molzen's PF&RD.

**IT IS FURTHER ORDERED** that Kirk's Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (*Doc. 3*) is **dismissed with prejudice** and a final order pursuant to Rule 58 be entered concurrently herewith.

  
UNITED STATES DISTRICT JUDGE